

**Nov 27, 2018**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WALBRIDGE ALDINGER LLC, a  
Michigan corporation,

Plaintiff,

v.

MICHAEL VANFOSSSEN, an  
individual,

Defendant.

No. 4:18-CV-05141-SMJ

**ORDER DENYING MOTION TO  
DISMISS**

Before the Court, with oral argument, is Defendant Michael Vanfossen's Motion to Dismiss Claim Brought Under CFAA and Tortious Interference Claim, ECF No. 18. Plaintiff Walbridge Aldinger LLC ("Walbridge") thereafter filed its First Amended Complaint. ECF No. 23.

An amended complaint supersedes the original complaint in its entirety, *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990), which renders a motion to dismiss moot, *Williamson v. Sacramento Mortg., Inc.*, No. CIV. S-10-2600 KJM, 2011 WL 4591098, at \*1 (E.D. Cal. Sept. 30, 2011). "However, when the amended complaint is substantially identical to the original complaint, an amended complaint will not moot the pending motion to dismiss."

1 *Oliver v. Alcoa, Inc.*, No. C16-0741JLR, 2016 WL 4734310, at \*2 n.3 (W.D.  
2 Wash. Sept. 12, 2016).

3 Here, Vanfossen agrees that his motion became moot as to the Computer  
4 Fraud and Abuse Act claim because it was removed in its entirety. ECF No. 28.  
5 And the remaining claim for tortious interference is identical in both the original  
6 and amended complaints. As such, the Court entertains the motion.<sup>1</sup> Having  
7 reviewed the pleadings and the file in this matter, the Court is fully informed and  
8 denies the motion.

### 9 **BACKGROUND**

10 Walbridge is a full-service construction company. ECF No. 23 at 3. On or  
11 about March 26, 2018, Microsoft Corporation (“Microsoft”) awarded the  
12 construction of a multi-million dollar project (the “Project”) to Walbridge as the  
13 preferred contractor during the first stage of a two-stage tendering method of  
14 procurement. *Id.* As part of the bidding process, Walbridge executed a  
15 nondisclosure agreement with Microsoft. *Id.*

16 Walbridge then hired Vanfossen as a senior project manager to oversee the  
17 Project. *Id.* Vanfossen’s employment lasted from May 8, 2018 to July 8, 2018,  
18 when Vanfossen abruptly resigned and accepted employment elsewhere. *Id.*

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20 <sup>1</sup> As the Court finds that oral argument is not warranted under Local Civil Rule  
7(i)(3)(B)(iii), the Court considered the motion without oral argument on the date  
signed below.

1 During his employment, Vanfossen was aware of the nondisclosure agreement that  
2 Walbridge had signed and was repeatedly reminded of the confidential nature of  
3 the information concerning the Project. *Id.* at 4.

4 In the weeks leading up to his resignation, Vanfossen forwarded at least  
5 forty-one emails to his personal Gmail account; the emails contained, *inter alia*,  
6 Walbridge's customized reports and documents, construction design schematics,  
7 and operating procedures. *Id.* at 4–8. Vanfossen also emailed to his personal Gmail  
8 account confidential and proprietary documents belonging to Microsoft, such as  
9 draft contracts and PowerPoint presentations containing detailed proprietary  
10 designs and engineering drawings. *Id.* at 8.

11 Walbridge brought the instant action on August 23, 2018. ECF No. 1. It filed  
12 an amended complaint on October 5, 2018 alleging four claims:  
13 (1) misappropriation of trade secrets under the Defend Trade Secrets Act,  
14 (2) misappropriation of trade secrets under Washington law, (3) replevin, and  
15 (4) tortious interference under Washington law. ECF No. 23.

## 16 **LEGAL STANDARD**

17 A complaint must contain “a short and plain statement of the claim showing  
18 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Under Federal Rule of  
19 Civil Procedure 12(b)(6), a complaint is subject to dismissal if it “fail[s] to state a  
20 claim upon which relief can be granted.” “Threadbare recitals of the elements of a

1 cause of action, supported by mere conclusory statements, do not suffice.”  
2 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

3 To survive a motion to dismiss under Rule 12(b)(6), a complaint must  
4 allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*  
5 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when  
6 “the plaintiff pleads factual content that allows the court to draw the reasonable  
7 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S.  
8 at 678. “Where the well-pleaded facts do not permit the court to infer more than  
9 the mere possibility of misconduct, the complaint has alleged—but has not  
10 ‘show[n]’—that the pleader is entitled to relief.” *Id.* at 679 (quoting Fed. R. Civ.  
11 P. 8(a)(2)).

12 In deciding a Rule 12(b)(6) motion, the Court construes the complaint in the  
13 light most favorable to the plaintiff and draws all reasonable inferences in the  
14 plaintiff’s favor. *Ass’n for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d  
15 986, 991 (9th Cir. 2011). The Court accepts as true all factual allegations  
16 contained in the complaint. *Iqbal*, 556 U.S. at 678.

## 17 **DISCUSSION**

18 At issue in this partial motion to dismiss is Walbridge’s fourth claim for  
19 tortious interference under Washington common law. Walbridge alleges it had a  
20 valid contractual relationship with Microsoft in the form of a nondisclosure

1 agreement. ECF No. 23 at 15. It further alleges that Vanfossen was aware of this  
2 contractual relationship and that as a result of Vanfossen's theft of Microsoft's  
3 confidential and proprietary information, Walbridge suffered and will continue to  
4 suffer harm and damages. *Id.* Vanfossen moves to dismiss this claim, contending  
5 that it is preempted by Washington's Uniform Trade Secrets Act ("UTSA")  
6 because "it is premised on Vanfossen's alleged misappropriation of trade secrets."  
7 ECF No. 18 at 4.

8 "The UTSA prohibits misappropriation of trade secrets." *Thola v.*  
9 *Henschell*, 164 P.3d 524, 527 (Wash. Ct. App. 2007). It "displaces conflicting tort,  
10 restitutionary, and other [Washington] law . . . pertaining to civil liability for  
11 misappropriation of a trade secret" but does not affect "[c]ontractual or other civil  
12 liability or relief that is not based upon misappropriation of a trade secret." Wash.  
13 Rev. Code §§ 19.108.900(1) & (2)(a). In short, it codifies and preempts "the basic  
14 principles of common law trade secret protection." *SEIU Healthcare Nw. Training*  
15 *P'ship v. Evergreen Freedom Found.*, 427 P.3d 688, 692 (Wash. Ct. App. 2018).

16 As the Washington Supreme Court has not outlined the framework that  
17 applies in analyzing the UTSA's preemption of claims, the Court must predict  
18 how the state's highest court would decide based on applicable law. *See Glendale*  
19 *Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1154 (9th Cir. 2003). Some courts look  
20 to whether the underlying facts of the claim are the same as for the trade secrets

1 claim: they “(1) assess the facts that support the plaintiff’s civil claim; (2) ask  
2 whether those facts are the same as those that support the plaintiff’s UTSA claim;  
3 and (3) hold that the UTSA preempts liability on the civil claim unless the  
4 common law claim is factually independent from the UTSA claim.” *Thola*, 164  
5 P.3d at 530. This ensures that there cannot be duplicate recovery for a single  
6 wrong of trade secret misappropriation. *See id.*

7 Other courts look to whether the elements of the claim require some  
8 allegation or factual showing beyond those required for the trade secrets claim.  
9 *See, e.g., LaFrance Corp. v. Werttemberger*, No. C07-1932Z, 2008 WL 5068653,  
10 at \*2 (W.D. Wash. Nov. 24, 2008); *SEIU Healthcare*, 427 P.3d at 694 (noting that  
11 *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665 (Wash. 1987), controls in using an  
12 elements-based analysis).

13 Based on the applicable law and the procedural posture of the case, the  
14 Court concludes that the Washington Supreme Court would probably apply the  
15 elements-based analysis at this stage. Here, the tortious interference claim requires  
16 proof of the existence of a valid contractual relationship or business expectancy,  
17 which is not an element of a trade secrets claim.<sup>2</sup> *See T-Mobile USA, Inc. v.*

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18 <sup>2</sup> A claim for tortious interference with a business expectancy requires five  
19 elements: (1) the existence of a valid contractual relationship or business  
20 expectancy, (2) that defendants had knowledge of that relationship, (3) an  
intentional interference inducing or causing a breach or termination of the  
relationship or expectancy, (4) that defendants interfered for an improper purpose

1 *Huawei Device USA, Inc.*, 115 F. Supp. 3d 1184, 1199 (W.D. Wash. 2015).  
2 Consequently, Walbridge's claim survives pleading standards under the elements-  
3 based test.

4 After the parties engage in factual discovery, more information will be  
5 available to apply *Thola*'s factual preemption test. It is simply unclear at the  
6 motion-to-dismiss stage whether Vanfossen did more than acquire and disclose  
7 confidential information, i.e., whether he used Microsoft's confidential  
8 information in a certain way or engaged in other acts such as direct solicitation.  
9 *See Thola*, 164 P.3d at 530 (noting that the defendant's actual solicitation of the  
10 plaintiff's clients made the tortious interference claim factually independent);  
11 *accord Fidelitad, Inc. v. Insitu, Inc.*, No. 13-CV-3128-TOR, 2014 WL 5421214, at  
12 \*4 (E.D. Wash. Oct. 24, 2014) ("It is premature to dismiss Plaintiff's tortious  
13 interference claim. A conclusion of whether a claim is preempted by the [U]TSA  
14 is generally reserved for later in litigation because it requires a factual analysis  
15 and facts are poorly developed at the pleading stage.").


16 Accordingly, **IT IS HEREBY ORDERED:**

17 Defendant's Motion to Dismiss Claim Brought Under CFAA and  
18 Tortious Interference Claim, **ECF No. 18**, is **DENIED**.

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20 or used improper means, and (5) resultant damage. *Leingang v. Pierce Cty. Med.*  
*Bur., Inc.*, 930 P.2d 288 (Wash. 1997).

1           **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order  
2 and provide copies to all counsel.

3           **DATED** this 27th day of November 2018.

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6                                 SALVADOR MENDOCZA, JR.  
7                                 United States District Judge  
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